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n456. 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

n457. See id. at 939-40.

n458. See Adarand, 115 S. Ct. at 2118-19 (Scalia, J., concurring).

n459. See Hopwood, 78 F.3d at 949.

n460. See 42 U.S.C. 2000d to 2000d-4a.

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[*91]

A court opinion outlawing affirmative action would invalidate the largely voluntary practices of thousands of educational institutions. What would be the basis for such an outcome? There are two possibilities. First, originalists might urge that an actual historical decision n461 should be used to foreclose democratic experimentation with race-conscious programs. The legacy of the Civil War, historically understood, is a ban on governmental use of race as a basis for the distribution of benefits and burdens.

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n461. There is, however, no evidence that the Equal Protection Clause was intended to stop affirmative action, and considerable evidence to the contrary. In fact, those who ratified the Fourteenth Amendment engaged in race-conscious remedial programs. See generally Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753, 754-88 (1985) (discussing the legislative history of the race-conscious programs of the Reconstruction era). It would be refreshing if some of the originalist Justices on the Court, who tend to oppose affirmative action on constitutional grounds, would either invoke some historical support for their views or acknowledge that although they do not approve of affirmative action in principle, they find no constitutional judgment that prohibits it.

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Second, a general principle ("color blindness") might be rooted not in history but in an independent judicial judgment about constitutional meaning. On this view, the ban on race consciousness does not reflect a specific judgment of the Framers. Indeed, the Supreme Court opinions most antagonistic to affirmative action have not purported to be originalist, but instead have reflected a judicial understanding of the moral principle for which the Constitution is best taken to stand. n462 Such opinions are far removed in form and substance from the narrower, fact-intensive, minimalist approach characteristic of Justice Powell in the Bakke case. n463

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n462. See, e.g., Adarand, 115 S. Ct. at 2112-13; Metro Broad., Inc. v. FCC, 497 U.S. 547, 631-33 (1990) (Kennedy, J., dissenting), overruled in part by Adarand, 115 S. Ct. 2097 (1995); Fullilove v. Klutznick, 448 U.S. 448, 522-26 (1980) (Stewart, J., dissenting).

n463. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

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The conclusion that emerges from the discussion thus far is that this is a context in which the Supreme Court would be singularly ill-advised to issue a broad ruling. There are many kinds of affirmative action programs. These programs are exceptionally diverse, and from the standpoint of both policy and principle, some are far better than others. A blanket ban would make little sense. This is especially so in light of the fact that this is an area in which democratic institutions are far from inattentive. On the contrary, the nation has embarked on a large-scale debate about such programs. n464 That debate raises complex issues of both morality and fact. In this way the affirmative action problem is quite similar to the problem raised by single-sex programs. In both instances the wide range of potentially relevant issues is hard to handle through a simple, rule-like constitutional decree.

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n464. Cf. Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring) (arguing that the Court should not determine whether gender is a suspect classification, because submitting the Equal Rights Amendment to the states for ratification had created an opportunity for the issue to be decided via democratic institutions).

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Ultimately the place of affirmative action programs should and will be decided democratically, not judicially. The history does not support an originalist attack on race-conscious programs. n465 And in view of the diversity of affirmative action programs, no clear-cut principle of (constitutionally relevant) political morality dooms all race consciousness. It would be an extraordinary form of judicial hubris for courts to invoke the Equal Protection Clause to require color blindness.

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n465. See Schnapper, supra note 461, at 785-88. The constitutional attack on affirmative action programs by Justices Scalia and Thomas, without any investigation of history on their part, is one of the most disturbing features of their purported originalism.

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2. The Passive Virtues. - In the 1995 Term, the Court declined an opportunity to settle a significant part of the affirmative action controversy by refusing to hear the University of Texas's appeal in Hopwood. In an unusual concurring opinion, Justice Ginsburg, joined by Justice Souter, explained the grounds for denying certiorari. n466 Justice Ginsburg said that the University of Texas Law School had changed its admissions procedures from those involved in the case and that it did not seek to defend the program that the lower courts had invalidated. n467 The University of Texas complained not of the court of appeals' judgment but of its rationale. This was insufficient: "We must await a final judgment on a program genuinely in controversy before addressing the

important question raised in this petition." n468

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n466. See Texas v. Hopwood, No. 95-1773 (U.S. July 1, 1996) (Westlaw, SCT database) (memorandum opinion of Ginsburg, J., with whom Souter, J., joined).

n467. See id.

n468. Id.

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Was the Court correct to deny certiorari in Hopwood? The answer is not simple. On the one hand, because the issue of affirmative action is not clearly settled by constitutional history or principle and is at the center of current political deliberations, n469 the Court does well to avoid an authoritative judicial ruling. On the other hand, the lower court's opinion appears to foreclose a range of possible programs in a large part of the country. Perhaps the Court should have taken the case to make clear that race neutrality is not required. But Justice Ginsburg was correct to say that it would have been inappropriate for the Court to confront the question in a context in which the very program at issue was not being defended. n470

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n469. See supra note 451.

n470. The Hopwood context is a good one for recalling the ban on advisory opinions. Because the University of Texas would not be defending its own program, any judgment by the Court would have an advisory quality.

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The broader point is that some of the Justices have undoubtedly been aware of the difficulty and variousness of the affirmative action problem and have chosen a minimalist approach for this reason. When it confronts race-conscious admissions policies in education, the Court should continue in this way. It should look for guidance to Justice Powell's Bakke opinion. It should proceed narrowly, looking [*93] closely at the details. It should economize on moral disagreement, refusing to resolve large-scale moral issues unless it is necessary to do so. This proposition does not suggest any particular outcome in any particular case. What it does suggest is that it would be a democratic disaster if the Court were to issue a broad ruling that foreclosed democratic debate.

B. The Right to Die

We are in the midst of a constitutional attack on laws that forbid physician-assisted suicide. n471 But the right to die debate is in one sense significantly different from the debate over affirmative action. In the former context, the relevant laws have been on the books for a long time, and in some states they have not been revisited by recently elected officials. n472

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n471. See, e.g., Quill v. Vacco, 80 F.3d 716, 727 (2d Cir. 1996), cert. granted, 64 U.S.L.W. 3795 (U.S. Oct. 1, 1996) (No. 95-1858); Compassion in Dying v. Washington, 79 F.3d 790, 837 (9th Cir. 1996), cert. granted, 64 U.S.L.W. 3785 (U.S. Oct. 1, 1996) (No. 96-110).

n472. See Quill, 80 F.3d. at 732, 735 (Calabresi, J., concurring).

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Do such laws invade a constitutional "right to privacy"? Many people and some courts think so. n473 Under Roe v. Wade, it might be urged that the government cannot legitimately interfere with self-regarding choices about what people should do "with their bodies," and that therefore the choice is for the individual, not for the state. Several courts have recently gone in this direction. n474

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n473. Cf. Compassion in Dying, 79 F.3d at 838-39 (stating that the liberty interest, which has roots in the privacy cases, prohibits the government from intruding into realms integral to personal autonomy).

n474. See id. at 801, 838-39; see also Quill, 80 F.3d at 727 (describing the longstanding right to refuse medical treatment in New York).

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Thus stated, the argument for a constitutional right to die raises many questions. For familiar reasons, the idea of substantive due process is textually awkward. n475 Even if there is a right to "substantive due process," it is not clear that this right encompasses or should encompass a right to die. Of course the individual interest can be very strong. But the situations in which a right to die might be asserted are widely variable, and legitimate considerations argue against recognizing a constitutional right. Perhaps some people choosing death would be confused, panicked, or myopic. Perhaps they would, in a relevant number of cases, choose irrationally, and in a way that reflects predictable short-term pressures. Perhaps some doctors would overbear their patients; the most appealing cases for physician-assisted suicide might be unrepresentative. Perhaps some families could not entirely be trusted, especially in view of possible conflicts of interest [*94] among family members. n476 Perhaps a prohibition on doctor-assisted death would have desirable effects on the norms of the medical profession, by inculcating the strongest possible pro-life culture. In any case, there are complex moral issues and contested empirical questions for which courts are unlikely to have clear answers. n477

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n475. See generally Ely, supra note 31, at 14-20 (arguing that the Supreme Court has erroneously invested the Due Process Clause with substantive content).

n476. Consider the recent vote of the American Medical Association to continue its policy opposing doctor-assisted suicides. See AMA Keeps Its Policy Against Aiding Suicide, N.Y. Times, June 26, 1996, C, at 9.

n477. For a good discussion, see Richard A. Posner, Aging and Old Age 235-61 (1995).

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In view of the difficulty of the underlying issues - our now-familiar theme - courts should be extremely reluctant to resolve this issue with any broad rule. At this stage of the debate, they lack the necessary factfinding expertise and policymaking competence. Recent court decisions announcing a large-scale "right to die" are versions of the Hopwood case - a form of judicial hubris. n478 They contrast sharply with the Court's own minimalist approach in the Cruzan case, where the Court, proceeding in good common law fashion, refused to do more than was necessary to resolve the concrete controversy. n479

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n478. It is therefore revealing that in Compassion in Dying, the court refers to Justice Brandeis's dissenting opinion in Olmstead v. United States as "the second most famous dissent in American jurisprudence," with a footnote saying that "the most famous dissent, of course, was that of the first Justice Harlan in Plessy v. Ferguson." Compassion in Dying, 79 F.3d at 800 & n.12 (citation omitted) (citing Olmstead v. United States, 277 U.S. 438 (1928)). The ranking seems odd, as does the "of course"; Justice Holmes's attack on substantive due process in Lochner v. New York, 198 U.S. 45, 65 (1905) (Holmes, J., dissenting), vies with Justice Harlan's opinion for the most honored position, and Justice Holmes's opinion - "the 14th Amendment does not enact Mr. Herbert Spencer's Social Statics" - raises questions about substantive due process as used in Compassion in Dying.

n479. See Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 277-78 (1990).

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Does this mean that courts should leave the question to politics? Perhaps; that would hardly be an unreasonable view. This is probably an area for democracy-allowing maximalism or instead use of the passive virtues through a refusal by the Court to become involved. But there is an alternative, and it bears on the principal difference between the affirmative action controversy and the controversy over the right to die. Recall the claim that a court charged with making a constitutional decision in the midst of a highly charged issue of political morality should attempt not to preempt but instead to improve and catalyze democratic deliberation. In this context, Judge Calabresi has suggested an inventive solution n480 in a self-conscious attempt to promote a kind of dialogue between courts and the public. With Judge Calabresi, let us notice first that some of the relevant laws were enacted long ago. They were designed not to prevent doctor-assisted termination of certain medically hopeless cases but instead to prevent people from being accessories to suicide. n481 In the relevant period, sui- [*95] cide was genuinely considered a crime. n482 But this reason for the statutes no longer holds much weight, since enforcement of the anti-suicide laws has fallen into near-desuetude. n483 In any event, the

current right to die cases are not simple cases of suicide, and human technology has developed a great deal, making possible forms of euthanasia that would have been unimaginable when the laws were first enacted. n484

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n480. See Quill v. Vacco, 80 F.3d 716, 743 (2d Cir. 1996) (Calabresi, J., concurring).

n481. See id. at 732 (suggesting that it is unclear whether these laws addressed physicians).

n482. See id. at 732-33.

n483. See id. at 734-35.

n484. See Richard A. Posner, Aging and Old Age 235-37 (1995).

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The central point, for those interested in democratic deliberation, is that in some states there may have been no recent or thorough legislative engagement with the underlying moral and technological issues. Does this bear on the constitutional question? It may well. A court might decide not to invalidate any and all legislative efforts to interfere with private choice, but to say more modestly that a state invoking old laws has not demonstrated an adequate reason to interfere with a private choice of this kind - unless and until a recent legislature is able to show that there is a sufficiently recent commitment to this effect to support fresh legislation.

Understood in this way, some imaginable right to die cases are reminiscent of Griswold v. Connecticut, n485 as that case is seen through the minimalist's lens. Recall that in Griswold the Court embarked on the task of taking large-scale positions on matters of political morality by speaking of the constitutional "right of privacy." n486 That right is both highly controversial and notoriously difficult to define. Instead, the Court in Griswold might have taken a very narrow approach. It might have said that laws that lack real enforcement and that appear (for that reason) no longer to reflect current political convictions cannot be used against private citizens with respect to decisions of this kind. A Court could so conclude without resolving the question whether a recent democratic judgment, supported by more than episodic or discriminating enforcement efforts, would be unconstitutional. In the fashion of Kent v. Dulles, Hampton v. Mow Sun Wong, and even United States v. Virginia, it could leave that question undecided.

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n485. 381 U.S. 479 (1965).

n486. Id. at 485.

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The underlying, time-honored principle involves desuetude. n487 That principle has strong democratic foundations. It means that when an old law is

practically unenforced because it does not receive sufficient public approval, ordinary citizens are permitted to violate it. In that way, they are permitted to call democratic attention to the space between the law as popularly conceived and approved and the law as it exists on the books.

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n487. See Bickel, supra note 8, at 148-56.

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I have suggested that in this way Griswold and the desuetude question can be linked with Hampton v. Mow Sun Wong. As we have seen, the problem in that case was the absence of sufficiently demonstrated public support for the enactment at issue; hence the Court effectively remanded the question to the President and Congress for fresh consideration. In other words, the Court objected to a legitimacy deficit; the solution consisted of an insistence that a decision of this kind, to be valid, required the support of a democratically accountable body. The same thing can be said for the question of desuetude. Here of course the problem is temporal rather than bureaucratic; it involves the absence of recent support rather than the absence of decision by a democratically accountable institution. But the basic problem - the legitimacy deficit - is the same. n488

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n488. Thus understood, the right to die cases can be closely linked with "actual purpose" review in United States v. Virginia. Recall that the central problem there was the absence of a showing that a recent legislature, acting without discriminatory motivations, had produced single-sex education for educational purposes. The Court refrained from deciding how it would handle a similar policy adopted by a legislature with an actual educational purpose in mind. By doing so, United States v. Virginia attempts to promote democratic deliberation in a way that is closely connected with the notion of desuetude; as I have noted, the case can even be understood as one of desuetude. A general discussion is Cass R. Sunstein, The Right to Die, 107 Yale L.J. (forthcoming Jan. 1997).

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It is not at all clear that the idea of desuetude is well-suited to the right-to-die context; New York and Washington, for example, have grappled with the issue in the recent past. But the general idea has much potential. n489 It does not involve judicial prohibition. It puts the burden of deliberation on representative bodies accountable to the people. Probably the right to physician-assisted suicide should be rejected, but the notion of desuetude, if inapplicable on the facts, might be held in reserve for an appropriate occasion.

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n489. See Quill v. Vaco, 80 F.3d 716, 734-35 (2d Cir. 1996) (noting recent discussions in New York); Compassion in Dying v. Washington, 49 F.3d 586, 590 (9th Cir. 1995), cert. granted, 64 U.S.L.W. 3785 (U.S. Oct. 1, 1996) (No. 96-110).

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C. Same-Sex Marriage

Does Romer v. Evans have implications for the current debate over same-sex marriage? Should courts pursue a minimalist path? As a practical matter, it is surely more likely that the Court would overrule Hardwick than that it would take the dramatic (and maximalist) step of saying that same-sex marriages must be allowed under the Equal Protection Clause. But after Romer, it is not altogether clear how a court should deal with an equal protection challenge.

To press especially hard on the institutional issues, let us make some very controversial assumptions. Let us assume that an equal protection challenge to the ban on same-sex marriages has a great deal of force. n490 Let us assume that Romer v. Evans, rightly understood [*97] and supplemented by the due process and equal protection holdings in Loving v. Virginia, n491 gives a great deal of support to such a challenge. n492 Of course this is not a necessary assumption. Perhaps the Court would say that the prohibition on same-sex marriage is certainly rational because it has been so longstanding. Perhaps the Court would say that marriage is legitimately reserved for relations between men and women. But let us assume that all of these responses are not, simply as a matter of substantive argument, convincing on the merits. If this is so, should the Court endorse the constitutional attack on the ban on same-sex marriages? There is a large question whether it should - not (we are now assuming) because the Court should be uncertain about the underlying principle, and not because the plurality of possible contexts confounds any simple rule, but because of the need for prudence in asserting even a correct principle against a democratic process that is not ready for it. n493

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n490. For a general discussion, see William N. Eskridge, Jr., The Case for Same-Sex Marriage 128-33 (1996).

n491. 388 U.S. 1 (1967).

n492. Congress has recently enacted a Defense of Marriage Act, S. 1740, 142 Cong. Rec. H7480-05, which allows states to deny recognition to same-sex marriages consummated in other states. The Act raises many issues. See Hearing on S. 1740 Before the Senate Comm. of the Judiciary, 102d Cong. (1996) (statement of Cass R. Sunstein, Professor of Law, University of Chicago). For present purposes the most interesting issue involves the reach of Romer v. Evans. Congress has never enacted a statute authorizing states not to recognize marriages made in other states; in fact Congress has never enacted a statute allowing states not to recognize any judgments of other states. The issue of marriage has been sorted out by traditional common law principles, allowing states to deny recognition in certain circumstances on the basis of their own policy judgments. Congress's decision to allow nonrecognition here - unaccompanied by a decision to allow nonrecognition in other contexts including marriages involving minors or incestuous marriages - appears to be a form of impermissible selectivity of the sort found in Romer. A minimalist Court could reach this conclusion without concluding that same-sex marriages must be recognized under the Equal Protection Clause. See also Letter from Laurence H. Tribe to Sen. Edward Kennedy (May 24, 1996), in 142 Cong. Rec. S5931 (1996)

(regarding constitutionality of Defense of Marriage Act).

n493. To be sure, the Court might have difficulty in making the predictive judgments. Those judgments depend on speculative assessments of evolving social norms, and courts have no special expertise in making those assessments. But some cases raise clear concerns, and this observation is sufficient support for the argument that I am making here.

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As it operates in the courts, constitutional law is a peculiar mixture of substantive theory and institutional constraint. n494 Even if judges find the challenge to the ban on same-sex marriages plausible in substance, there is much reason for caution on their part. Immediate judicial invalidation of same-sex marriages could well jeopardize important interests. It could galvanize opposition and (predictably) lead to a strong movement for a constitutional amendment overturning the Court's decision. It could weaken the antidiscrimination movement itself as that movement is operating in democratic arenas. n495 It could provoke increased hostility and even violence against homosexuals. It would certainly jeopardize the authority of the judiciary.

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n494. See Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1263 (1978).

n495. Cf. Rosenberg, supra note 8, at 182-89 (discussing the reaction to Roe v. Wade).

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Is it too pragmatic and strategic, too obtusely unprincipled, to suggest that judges should take account of these considerations? n496 Surely not. Prudence is not the only virtue; it is certainly not the master virtue. But it is a virtue nonetheless. At a minimum, courts should generally use their discretion over their dockets to limit the timing of intrusions into the political process. It also seems plausible to suggest that courts should be reluctant to vindicate even good principles when the vindication would compromise other interests, especially if those interests include, ultimately, the principles themselves. It would be far better for the Court to do nothing - or better yet, to start cautiously and to proceed incrementally.

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n496. See Marc Fajer, With All Deliberate Speed? A Reply to Professor Sunstein, 70 Ind. L.J. 39, 39-40 (1994).

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Following Romer v. Evans, the Court might find - as some lower courts have done n497 - that government cannot rationally discriminate against people of homosexual orientation, without showing that those people have engaged in acts that harm any legitimate government interest. Following Romer, the Court might look with some care to test whether something other than hostility and animus

are the basis for discrimination. Narrow rulings of this sort would allow room for public discussion and debate n498 before obtaining a centralized national ruling that preempts ordinary political process.

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n497. See Steffan v. Aspin, 8 F.3d 57, 67 (D.C. Cir. 1993); Watkins v. United States Army, 875 F.2d 699, 728-29 (9th Cir. 1989).

n498. Of course, discussion and debate can be promoted by maximalist decisions that broadly foreclose majoritarian outcomes. A public outcry often follows such decisions. Consider the responses to Dred Scott, Lochner v. New York, Brown v. Board of Education, and Roe v. Wade. The public deliberation that followed such decisions might provide a reason for applauding the decisions on democratic grounds. See Dworkin, supra note 3, at 344-46 (discussing Learned Hand). But in such cases the discussion is by hypothesis futile, and for deliberative democrats, deliberation is best when accompanied by the power of decision.

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We can go much further. Constitutional law is not only for the courts; it is for all public officials. The framers' original understanding was that deliberation about the Constitution's meaning would be part of the function of the President and legislators. n499 Of course the Court's judgments are final in litigated cases, but all officials have a duty to maintain fidelity to the founding document. The post-Warren Court identification of the Constitution with the decisions of the Supreme Court has badly disserved the traditional American commitment to deliberative democracy. And in that system, elected officials should have a degree of interpretive independence from the judiciary, certainly outside of the context of litigated cases. They should sometimes fill the institutional gap created by the courts' inferior factfinding ability and policymaking competence. n500 For this reason, the Court may go less far than other branches even if all branches are acting in the name of the Constitution. Similarly, other branches may [*99] conclude that practices are unconstitutional even if the Court would uphold them. In the area of same-sex marriages, this would be a good way to proceed.

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n499. See Sunstein, supra note 3, at 9-10.

n500. See Sager, supra note 494, at 1263-64.

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Conclusion

The upshot of appreciating the fluidity of the subject that Congress must regulate is simply to accept the fact that not every nuance of our old standards will necessarily do for the new technology, and that a proper choice among existing doctrinal categories is not obvious.... Justice Breyer wisely reasons by direct analogy rather than by rule ....

Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2402 (1996) (Souter, J., concurring).

In this Foreword, I have explored the practice of minimalism in law. Minimalism is best understood as an effort to leave things open by limiting the width and depth of judicial judgments. Minimalist judges try to keep their judgments as narrow and as incompletely theorized as possible, consistent with the obligation to offer reasons. They are enthusiastic about avoiding constitutional questions; they like to use doctrines of justiciability, and their authority over their docket, to limit the occasions for judicial intervention into politically contentious areas; the ban on advisory opinions guides much of their work. They try to reduce the burdens of judgment for Supreme Court justices, to minimize the risks of error introduced by broad rules and abstract theories, and to maximize the space for democratic deliberation about basic political and moral issues. Minimalist courts also respond to the sheer practical problem of obtaining consensus amidst pluralism. This problem can produce minimalism in the form of incompletely-specified abstractions and incompletely-theorized, narrow rulings.

The question whether to leave things undecided helps to unite a number of seemingly disparate issues and problems in public law. Examples include doctrines of justiciability; the grounds for granting certiorari; the rules-standards debate; the "tiers" of constitutional scrutiny; "clear statement" principles in statutory construction; the void-for-vagueness and nondelegation doctrines; the uses of dicta; and so-called balancing vs. so-called absolutism. In each of these areas, minimalists and maximalists sharply diverge, in part because of different assessments of which route is most likely to minimize both the mistakes and the burdens of decision, in part because of competing judgments about what is required by democracy, properly understood.

Sometimes minimalism is a blunder; sometimes it can produce great unfairness. Whether minimalism makes sense cannot be decided in the abstract. The answer has a great deal to do with costs of decisions and costs of error. The case for minimalism is strongest when courts lack information that would justify confidence in a comprehensive ruling; when the need for planning is not especially insistent; when the decision [*100] costs of an incremental approach do not seem high; and when minimalist judgments do not create a serious risk of unequal treatment. Thus minimalism is usually the appropriate course when circumstances are changing rapidly or when the Court cannot be confident that a broad rule would make sense in future cases.

There were important instances of minimalism in the 1996 Term. Romer v. Evans was insistently minimalist; the case may have planted a seed for future development, but it may not have. The Court's stated prohibition on measures based on "a bare desire to harm a politically unpopular group" n501 raises many questions, but it gets at the heart of what was wrong with Amendment 2. This idea also links the Moreno-Cleburne-Romer trilogy with a reasonable understanding of the Equal Protection Clause, one that bans state efforts to create a form of second-class citizenship. But the Court left this idea incompletely theorized, not least because the Court did not mention Bowers v. Hardwick. For the future, the best approach may well be to ground the Due Process Clause in tradition and the Equal Protection Clause in a tradition-correcting norm of civic equality. If things are understood this

way, Hardwick was not overruled by Romer v. Evans. And if Hardwick was wrong, it is because it was a case of desuetude, and in that sense linked with Kent v. Dulles and Hampton v. Mow Sun Wong.

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n501. Romer v. Evans, 116 S. Ct. 1620, 1628 (1995) (quoting United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (internal quotation marks omitted).

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With this idea we can see an important strand in constitutional doctrine and an important form of minimalism: decisions that are not simply democracy-foreclosing or democracy-authorizing, but instead democracy-forcing. Such decisions promote both reason-giving and accountability. Implementing the liberal principle of political legitimacy, they attempt to model and to police the system of public reason. This idea connects the "clear statement" cases, the concern with desuetude, the void for vagueness and nondelegation doctrines, rationality review, and the requirement that certain forms of discrimination be justified by actual rather than hypothetical purposes.

With respect to affirmative action, the right to die, and same-sex marriages, the Court should eschew broad rules and proceed in a way that complements and does not displace democratic processes. n502 The Court should certainly avoid a broad rule of "color blindness"; this would be a singular form of judicial hubris. Nor should the Court at this stage create a broad-ranging right to die or say that same-sex mar- [*101] riages must be recognized. Instead it should proceed cautiously and incrementally.

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n502. It may be tempting to think that democracy-forcing invalidation is an oxymoron. Invalidation might appear undemocratic by its very nature. As I have suggested, however, we should not identify outcomes of political processes with democracy, properly understood. For example, the process may have lacked sufficient accountability, see Hampton v. Mow Sun Wong, 426 U.S. 88, 103-05 (1976); Kent v. Dulles, 357 U.S. 116, 130 (1958), or sufficient deliberation and reason-giving, see United States v. Virginia, 116 S. Ct. 2264, 227682 (1996); Romer v. Evans, 116 U.S. 1620, 162829 (1996)

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Nothing I have said here denies that rules may make a good deal of sense and that in some cases diverse judges can and should converge on theoretically ambitious abstractions. These are some of the most glorious moments in any nation's legal culture. An inquiry into decision costs and error costs will sometimes argue against minimalism. I am stressing a narrower point. When a democracy is in moral flux, courts may not have the best or the final answers. Judicial answers may be wrong. They may be counterproductive even if they are right. Courts do best by proceeding in a way that is catalytic rather than preclusive, and that is closely attuned to the fact that courts are participants in the system of democratic deliberation. It is both inevitable and proper that the lasting solutions to the great questions of political morality will come from democratic politics, not the judiciary. But the Court can certainly

increase the likelihood that those solutions will be good ones. Sometimes the best way for the Court to do this is by leaving things undecided.

LEVEL 1 - 44 OF 96 ITEMS

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COMMENTARY: ERIE-EFFECTS OF VOLUME 110: AN ESSAY ON CONTEXT IN INTERPRETIVE THEORY

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SUMMARY:
... In this essay, Professor Lessig argues that the two Articles have more in common than might at first appear: both Articles attempt to make a commonly accepted practice contestable, and bid to change that practice in a manner that delegates decisionmaking power to more democratically accountable actors. ... This relatively benign practice of Swift, however, was the practice of federal general common law only at its birth. ... These two questions brewed in the criticism of Swift leading up to Erie - though few tied the criticism to the changed understanding of the common law, and most simply spoke of Swift as originally mistaken. ... "Positivism" and "realism" became ways of organizing opposition to a practice that was no longer the benign delegation of Swift. ... In Erie, the contestability was about the judicial role in the articulation of federal general common law. ... If the contest that Bradley and Goldsmith champion is eventually recognized as contestable, then how the Court moves the discourse from box [1] to box [2] will say something about the legal values that the Court recognizes - about the value, we might say, of legal philosophy versus justice. ... Left open, of course, are many questions - ranging from questions about the justifiability of such change, to questions about how such change is identified, to methodological questions about when a discourse is contested, or contestable, and about what keeps a contest in the background. ...

TEXT:
[*1785]

Two Articles from this volume of the Harvard Law Review propose changes in the role of federal courts. One, by Curtis Bradley and Jack Goldsmith, argues that customary international law should not be considered federal common law, despite the contrary beliefs of many international lawyers. The other, by Dan Kahan, proposes that Chevron deference be granted to the Department of Justice's interpretation of criminal statutes. In this essay, Professor Lessig argues that the two Articles have more in common than might at first appear: both Articles attempt to make a commonly accepted practice contestable, and bid to change that practice in a manner that delegates decisionmaking power to more

democratically accountable actors. The proposals of both Articles follow a pattern that he calls the Erie-effect. In this pattern, changes in context as well as changes in the practice at issue make it possible to question the legitimacy of continuing to engage in the practice and push the issue to the foreground of public attention. This essay hopes to spark debate on the proper role of context in interpretive theory by using the lens of the Erie-effect to explore how practices are rendered contestable.

Consider two Articles from this volume of the Harvard Law Review. The first argues that, contrary to dominant understandings of international lawyers, customary international law is not federal common law. n1 The second argues that, contrary to dominant understandings of criminal lawyers, Chevron deference should be given to the Department of Justice's interpretations of ambiguous criminal statutes. n2 To the unfamiliar, both claims seem quite innocuous. But to the rest, they are bombshells. Each makes a radical break with a dominant view (among academics at least); each will excite an extensive and sustained debate.

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n1. See Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 817 (1997).

n2. See Dan M. Kahan, Is Chevron Relevant to Federal Criminal Law?, 110 Harv. L. Rev. 469, 469 (1996).

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The substantive law that guides each Article is distinct, and so too are the problems that each addresses. Yet in this essay I want to argue that in an important sense, both Articles are the same. Both arise from a common source, and both argue a common pattern. The source is a kind of contestability; the pattern I call the Erie-effect.

The Erie-effect describes one model of legal change. It tracks a reallocation of institutional authority among legal actors, brought about by a change in the interpretive context of this institutional authority. [*1786] This change in context can be either a change in the practice in which these actors engage, a change in understandings about this practice, or both. n3 But whatever its source, the change yields a certain contestability about this institutional authority, or more directly, about the legitimacy of these actors continuing to engage it. It is this contestability that in turn yields the reallocation that the Erie-effect describes.

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n3. For a more complete description of the Erie-effect, see Lawrence Lessig, Understanding Changed Readings: Fidelity and Theory, 47 Stan. L. Rev. 395, 426-38 (1995).

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These shifts are often significant. They include some of the most important interpretive changes in our constitutional past. Yet they are not themselves the product of democratic action. No one votes for the changes that an Erie-effect yields. Instead, Erie-effect changes arise indirectly, as a product of other direct action. They are the consequences of changes in how we view the world, and yield significant shifts in how law is practiced. Yet although they do not issue from democratic action directly, they are nonetheless the product of a certain respect for democratic authority. It is democratic legitimacy that ultimately justifies these democratically unratified changes in legal and constitutional practice. My aim in this essay is to suggest just how.

The key is an attention less on the foreground of interpretive practice, and more on the background; a turn away from a practice of interpretive theory that emphasizes the significance of text n4 and political change, n5 and toward a practice that reflects an understanding of how changes behind these foreground objects matter. This is the place for context theory: for an understanding of how changes in context matter to institutional practice, and how they might justify significant interpretive change. n6 The Erie-effect is one part of such a theory; it may by its form suggest other parts as well.

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n4. See, e.g., Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221, 1224 (1995).

n5. See, e.g., 1 Bruce Ackerman, We the People: Foundations 119-21 (1991).

n6. This is not the place to hazard either a complete catalog of competing interpretive theories within law or a complete account of how they might relate to what I call context theory. For purposes of introduction, plain-meaning theories may be the paradigm of foreground theories of interpretation, relying in their most extreme form on the text alone. See William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321, 340-45 (1990) (describing textualism). Simpler forms of originalism are likewise foreground theories, because of their focus on expressed understandings or arguments made by the Framers at the time of the founding. See Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 363-72 (1977). But foreground theories are not universally unsophisticated. Ackerman's account, for example, of constitutional change at the time of the New Deal is primarily foreground-focused, though quite reflective. See 1 Ackerman, supra note 5, at 105-30. Nor are context theories universally subtle (in the sense of using theory to predict judicial practice). See Michael J. Klarman, Antifidelity, 69 S. Cal. L. Rev. (forthcoming Jan. 1997). Context theories, in the sense I explore below, include Eskridge's dynamic statutory interpretation theory, see William N. Eskridge, Jr., Dynamic Statutory Interpretation passim (1994), as well as the forms of moderate originalism described by Brest, see Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 205, 222-24 (1980). Though not directly about constitutional theory, Stanley Fish's work is aptly described as a work of context theory. See Stanley Fish, Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies passim (1989).

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- [*1787]

In this short essay, I describe the arguments of the two Articles from Volume 110 enough to link them together, and to the model for the effect that I am describing - Erie Railroad Co. v. Tompkins. n7 I then highlight other examples that follow the same pattern and, finally, suggest something about what this model might reveal about interpretive theory more generally. My aim is neither to give a full account of Erie nor to restate the arguments of the two Articles from this volume. It is instead to use this case, and these Articles, to suggest something about the nature of legal change, and something about the incompleteness of current interpretive theory within law.

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n7. 304 U.S. 64 (1938). I use Erie as a model not because I believe the effect I am describing originates in Erie, but because Erie best reveals the features that will be important to the more general account. Once these features are seen, we can identify examples of the effect that predate Erie. I suggest at least one of these below. See infra note 86.

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I. Erie Railroad Co. v. Tompkins

In the spring of 1938 - one year after the famous "switch in time" that saved the Supreme Court from President Roosevelt's court-packing plan, two months after the appointment of Justice Stanley Reed, Roosevelt's second appointee and the author of that court-packing plan, and four months after oral argument with no briefing on the question - the Supreme Court, in Erie Railroad Co. v. Tompkins, overturned a federal court practice with at least a ninety-six-year pedigree. This was the practice of "finding" "federal general common law," n8 contrary state court judgments notwithstanding. The practice had been widely attacked in the generation leading up to the case, most famously by Justice Holmes n9 and originally by Justice Field. n10 In Erie, these attacks finally had their effect. There is, the Court held, "no federal general common law." n11 A practice common at the founding, and ratified uncontroversially by Justice Story in Swift v. Tyson, n12 was now, Justice Brandeis concluded, unconstitutional. n13

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n8. Erie, 304 U.S. at 78.

n9. See, e.g., Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532-36 (1928) (Holmes, J., dissenting); Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370-72 (1910) (Holmes, J., dissenting).

n10. See, e.g., Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting).

n11. Erie, 304 U.S. at 78.

n12. 41 U.S. (16 Pet.) 1 (1842).

n13. See Erie, 304 U.S. at 77-78.

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Why? What had changed? Until recently, most have argued that nothing had changed - that Swift was wrong in 1842, as it was [*1788] wrong in 1938. n14 But recent scholarship has drawn this view into doubt. n15 Swift, these scholars argue, was not wrong when decided. In its time, it ratified a practice that was wholly unremarkable, both at the state and federal level. n16

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n14. See Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 85 (1923). In a famous rebuttal, Judge Friendly challenged Warren's statutory reading of section 34 of the Judiciary Act of 1789. See Henry J. Friendly, In Praise of Erie - And of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 389 (1964).

n15. See Bradford R. Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1272, 1276-92 (1996); William A. Fletcher, The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance, 97 Harv. L. Rev. 1513, 1514 (1984); Larry Kramer, The Lawmaking Power of the Federal Courts, 12 Pace L. Rev. 263, 277-79 (1992).

n16. See Tony Freyer, Harmony & Dissonance: The Swift & Erie Cases in American Federalism at xiii, 3 (1981).

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But what then about Erie? If Swift was correct then, does it cast doubt on Erie now? n17 In my view, it does not. Both cases, in my view, were correct when decided. n18 Seeing why teaches us something important about interpretive change.

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n17. See Friendly, supra note 14, at 392-94 (discussing Prof. Crosskey's argument for why Erie was wrongly decided).

n18. Other scholars have agreed with this view. See Randall Bridwell & Ralph U. Whitten, The Constitution and the Common Law: The Decline of the Doctrines of Separation of Powers and Federalism 3 (1977) (stating that "the common law authority of the federal courts as it was actually employed between 1789 and about 1860 is constitutionally justifiable"); Edward S. Stimson, Swift v. Tyson - What Remains? What is (State) Law?, 24 Cornell L.Q. 54, 65 (1938).

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The key is to focus on changes in the practice of the common law, and changes in how the common law was understood. How did Justices, or as Professor Casto puts it, jurists in the "Justices Class," n19 view the practice ended by Erie? What had federal general common law come to mean for them?

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n19. William R. Casto, The Erie Doctrine and the Structure of Constitutional Revolutions, 62 Tulane L. Rev. 907, 912 (1988).

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To answer this question, we must start with the moment at which this doctrine was ratified - the case of Swift v. Tyson. Swift was a small case. In the scheme of things, it involved a tiny matter. n20 At issue was an open question of commercial law - "whether acceptance of a negotiable instrument in satisfaction of a preexisting debt rested upon sufficient consideration to confer upon the recipient the status of 'a bona fide holder.'" n21 Different authorities suggested different results: New York courts had held that the preexisting debt was not sufficient consideration; n22 federal courts had concluded that it was. n23 The first question then was the priority of these authorities - whether these state opinions about a matter not within the federal power [*1789] should bind the Supreme Court's reading of the common law on such matters. n24

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n20. See Fletcher, supra note 15, at 1514.

n21. Clark, supra note 15, at 1277.

n22. See Swift v. Tyson, 41 U.S. (16 Pet.) 1, 17 (1842).

n23. See id. at 20.

n24. See Fletcher, supra note 15, at 1515.

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To answer that question, Justice Story turned to Congress's direction about which law federal courts should apply - the Judiciary Act of 1789. Its text was plain enough: "the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." n25 To a modern reader, the meaning of these words is fairly clear: law, we would think, is either federal or state law; this statute commands federal courts to track state law when it applies; thus, in a matter not governed by federal law, it directs federal courts to do what state law requires. Of course, the statute does not say who gets to say what state law requires. But it seems a stretch to read into that silence the idea that federal courts may interpret state law independently. That is no doubt a possible reading; it just seems a stretch. The more natural reading is that federal courts should follow state law, however that law is articulated.

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n25. Judiciary Act of 1789, ch. 20, 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. 1652 (1994)).

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This reading, however, was not Justice Story's. For although the statute directed federal courts to follow state law, Justice Story did not believe that "state law" included court decisions interpreting non-local matters:

It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts ... and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case.... The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield ... to be in a great measure, not the law of a single country only, but of the commercial world. n26

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n26. Swift, 41 U.S. (16 Pet.) at 18-19 (emphasis added) (citations omitted).

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Much about this quote should strike us as odd. How is the task of finding the "true exposition of the contract" n27 relevant to the articulation of the common law? How could the law being articulated be neither state law nor federal law, but instead the law of the "commercial [*1790] world?" n28 And finally, as we learn from many other sources, n29 how is this law of the commercial world, though articulated by a federal court, not binding on state courts - and likewise, if articulated by a state court, not binding on federal courts?

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n27. Id. at 19.

n28. Id.

n29. See, e.g., Clark, supra note 15, at 1280; Fletcher, supra note 15, at 1514, 1517; Friendly, supra note 14, at 407.

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These oddities are a clue. Two adjustments to Justice Story's use of the word "law" will make them go away. First, Justice Story was speaking of the source of the common law, or more precisely, the source of its substance. He was not speaking of the source of its power. As any jurist from the time would have said, the power of the common law comes from its adoption, or recognition, by a domestic court. Courts give the common law its effect. n30 But the substance of the law to which a court gives effect is determined elsewhere - in this case, by the "commercial world."

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n30. This is the view suggested much later by Justice Holmes in The Western Maid, 257 U.S. 419, 432 (1922), but nothing in the early practice must be seen as inconsistent with it.

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But this just raises a second problem for the modern reader. How could the substance of law be determined by private parties? How could lawmaking power be exercised by someone other than a sovereign? What is the "commercial world" to be determining the contours of sovereign authority? The picture is as odd as deciding that the law of cyberspace will be determined by Microsoft.

This oddness, I suggest, is the product of a modern blindness. When we think of "law," we are likely to think of a rule of tort, or of an FCC regulation - binding external rules imposed on parties regardless of their preference for the rule, or of their desire to be bound. That is the essence of our modern, activist sense of "law," and it is the sense we are likely to give the term when we read it in Justice Story's hand.

But in this we forget another modern sense of the term "law" - a sense of "law" determined by private parties in just the way that Justice Story meant. We call this law "contract." Contract recognizes a set of obligations, the substance of which is determined by private parties. These obligations, in the hands of a court, become "law." They are law that the parties have chosen, not law in the sense of a regulation imposed. n31 But though agreed to ex ante, rather than imposed ex post, they function as law just as regulations function as law. n32 Ex post, they are expressions of sovereign authority, even if ex ante they are expressions of private desires.

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n31. Cf. Bridwell & Whitten, supra note 18, at 13 (stating that the derivation of custom is not "promulgation of a legal principle by the fiat of a sovereign").

n32. Indeed, as James Carter argued, that the common law does not impose duties ex post is one of its strongest virtues. See id. at 19-22.

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This is the sense of law that Justice Story was speaking of (and it explains his odd reference to the rules for interpreting a contract as a way to understand the finding of the common law). The common law at issue in Swift was the law merchant. n33 The law merchant was customary law. n34 Customary law was constituted by the usual or ordinary understandings of parties to a commercial transaction. n35 It referred, that is, to a set of understandings, some ratified by long practice, but not all necessarily rooted in long practice. n36 This was law in the sense of defaults - rules that would govern in a contract where no explicit terms controlled. n37 It was law as the UCC might recognize the customs of an industry as law n38 - binding unless the parties agree differently.

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n33. See Clark, supra note 15, at 1290; Fletcher, supra note 15, at 1515. For a discussion of the "new law merchant," see Robert D. Cooter, Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant, 144 U. Pa. L. Rev. 1643, 1646-50 (1996).

n34. See Bridwell & Whitten, supra note 18, at 66; Clark, supra note 15, at 1301.

n35. See Bridwell & Whitten, supra note 18, at 4, 58, 90.

n36. See id. at 12.

n37. See The Reeside, 20 F. Cas. 458, 459 (C.C.D. Mass. 1837) (No. 11,657) ("An express contract of the parties is always admissible to supersede, or vary, or control, a usage or custom ...."); Bridwell & Whitten, supra note 18, at 57 ("There is certainly ample authority ... for the ability of express contract stipulations to control usages of the trade."); Clark, supra note 15, at 1280 (defining customary law "as a set of background rules that courts applied in the absence of any binding sovereign command to the contrary").

n38. See Jim C. Chen, Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant, 27 Tex. Int'l L.J. 91, 95-98 (1992). Chen's article offers another dimension along which we might say that the Erie-effect gets played. As contract law moved from subjectivist to objectivist, see id. at 108-11, the public law aspect of contract law became more salient and transparent. In the terms of this essay, this change in turn raised questions about the institutional allocation of customary law within contract law. These questions are forms of the Erie-effect.

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No doubt, as the realists struggled to teach, this "law" entailed a delegation of sovereign authority to private actors. n39 But not all delegations are equally troubling, and this delegation in particular was relatively benign. It was benign not only because the power delegated was little more than the power to set a default, but also, and more importantly, because this law operated within a jurisdictional sphere that states on their own could only imperfectly regulate. n40 This "law" governed a set of relations that were, in the main, outside the scope of any single sovereign power. n41 (This was general common law as articulated by a federal court sitting in diversity.) States were free to legislate locally where they could, and federal courts were required to [*1792] respect local rules. n42 But where the states did not legislate, then like the law of nations, of which the law merchant was one part, n43 this law filled a gap in individual sovereign authority. This was customary law accommodating the limitations thought inherent in sovereign jurisdiction.

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n39. The classics are Morris R. Cohen, Property and Sovereignty, 13 Cornell L.Q. 8 (1927), and Louis L. Jaffe, Law Making by Private Groups, 51 Harv. L. Rev. 201 (1937).

n40. See Bridwell & Whitten, supra note 18, at 8. As Bridwell and Whitten argue, the federal interest was substantively tied to maintaining neutrality among state forums and to protecting against state partiality. See id. at 13.

n41. See id. at 8.

n42. See id. at 78.

n43. See id. at 51; Fletcher, supra note 15, at 1517, 1519. The source of the law merchant was the "law of nations," which was part of the common law - a distinct body of law operable within the United States, though not derived from the sovereigns of the United States. As Edwin Dickinson has noted, it "embraced a good deal more than the body of practice and agreement which came later to be called public international law." Edwin D. Dickinson, The Law of Nations as Part of the National Law of the United States, 101 U. Pa. L. Rev. 26, 26 (1952).

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This relatively benign practice of Swift, however, was the practice of federal general common law only at its birth. It was not the practice that Erie overturned. For in the ninety-six years in between, and especially in the seventy-five years immediately prior to Erie, the practice of federal general common law, and the context of federal general common law, changed. Both changes changed the meaning of Swift.

The practice changed as federal general common law came to include a much broader range of law. n44 Although at the start its scope was essentially contract, by the end it reached far beyond contract, even to the law of torts. n45 This change in scope in turn changed the nature of the common law practice: federal general common law was less the practice of gap-filling for parties to a commercial transaction, and more a practice of norm-enforcement, covering a substantial scope of sovereign authority. The common law was no longer reflective, or mirroring of private understandings; n46 it had become directive, or normative over those private understandings. n47 It was no longer historical; the common law had become rationalizing. n48

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n44. See Kramer, supra note 15, at 282-83.

n45. See Bridwell & Whitten, supra note 18, at 96-97, 116, 119; Freyer, supra note 16, at 69-72.

n46. See Bridwell & Whitten, supra note 18, at xiv (describing the early view of law as supporting "self-ordering forces" (internal quotation marks omitted)).

n47. This parallels a more general move, both on the right and left, to use law to transform society. See Richard F. Hamm, Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1820-1920, at 5 (1995).

n48. See Bridwell & Whitten, supra note 18, at 123.

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As this practice changed, understandings about it changed as well. As theories of the common law developed, understandings about the nature of the common law changed. As the practice of the common law became less reflective and more directive, theories of the common law as custom yielded to theories of the common law as science. The theories that fit the emerging practice saw the common law as normative, and these in turn displaced theories that insisted that the common law was simply reflective. [*1793]

It is not my purpose to separate out which came first - the change in practice or the change in ideas about that practice, if indeed it is possible to say that one preceded the other. Whichever came first, or even if both emerged together, the important point is the effect that these shifts would have on the "benign delegation" that Swift had allowed. For it is one thing to delegate when the substance of the law delegated is narrow, and reflective, and law-by-default. But when the substance becomes broad, and directive, and displaces private choice, the role of the courts in this delegation becomes questionable. And this, I argue, is the uneasiness that led to the change effected by Erie.

The source of this trouble was a change in what the common law was. n49 Two questions were increasingly difficult to avoid. The first was the question about source (what we could call the positivist's question): what is the source of the common law when it becomes rationalizing or activist? The second was the question about constraint (the realist's question): whatever the source, to what extent was this activist common law tracking its source, and to what extent did the source really constrain it?

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n49. See id. at 124-26. For a description of the change in jurisprudence, see G. Edward White, From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America, 58 Va. L. Rev. 999, 1013-28 (1972). See also Freyer, supra note 16, at xiii (describing changes in early twentieth-century jurisprudence).

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These two questions brewed in the criticism of Swift leading up to Erie - though few tied the criticism to the changed understanding of the common law, and most simply spoke of Swift as originally mistaken. n50 To the extent that no clear source existed, or to the extent that the source named may not really have been the source of the substantive norm, the position of federal judges became increasingly questionable. For the positivist, as these became questions more clearly within the domain of state law, the question became: why are federal judges making this state law? And for realists, as this practice seemed more and more making law rather than finding law, the question became: why are federal judges making this state law?

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n50. Justice Holmes was consistently quite unfair to Swift, writing as if the doctrine he was attacking was the doctrine that Swift had created. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532-36 (1928) (Holmes, J., dissenting), and Kuhn v. Fairmont Coal Co., 215 U.S. 349,

370-72 (1910) (Holmes, J., dissenting)). This is blaming the parent for the sins of the child; Swift had little responsibility for the brooding omnipresence theory that Justice Holmes attacked.

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The force of both questions reached its climax in Erie. Wrote Justice Brandeis, echoing Justice Holmes, "law in the sense in which courts speak of it today does not exist without some definite authority behind it." n51 This is Brandeis the positivist. And wrote Justice Brandeis, echoing Justice Field, "[federal general common law] is often little [*1794] less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject." n52 This is Brandeis the realist. "Positivism" and "realism" became ways of organizing opposition to a practice that was no longer the benign delegation of Swift. n53 Together they rendered contestable the role of federal courts in this articulation of the common law. n54

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n51. Id. at 79 (quoting Black & White Taxicab & Transfer Co., 276 U.S. at 533 (Holmes, J., dissenting)) (internal quotation marks omitted). Cass Sunstein links the same point to the Court's changing view about the naturalness of contract and property. See Cass R. Sunstein, Lochner's Legacy, 87 Colum. L. Rev. 873, 880-81 (1987).

n52. Erie, 304 U.S. at 78 (quoting Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting)) (internal quotation marks omitted).

n53. I do not mean to suggest that the jurists of the mid-1930s would have found the delegations in Swift to be as benign as the Justices in Swift might have. No doubt there was a critical change in the legal culture at the time of Erie that increased sensitivity to this point of realism. My point is simply that this change in sensibility occurs at the same time as a change in practice, which suggests that the one may well be related to the other.

n54. See Clark, supra note 15, at 1262-63; Kramer, supra note 15, at 283 ("This view of the common law ... is dead, a victim of positivism and realism."). It is misleading to suggest that there was only one realism during this period. Realists during the early period resisted judicial constructivism, although they argued that judges construct; realists during the later period pushed judicial constructivism. What unites the two schools is a rhetoric that emphasizes the constructive in judicial actions, though of course this idea does not define them or make them unique. See John Austin, The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence 30-33 (Noonday Press 1954) (1832); see also John Henry Schlegel, American Legal Realism and Empirical Social Science 49-50 (1995) (describing the conflict between the advocates of law as a legal science and law as a social science).

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This contestability followed from something relatively constant throughout the period. n55 This is the agency view of judging: that judges are to track the will of others, and that when they do not, at least without clear sanction, their actions in context appear "political." n56 They appear political in the

sense of making decisions that seem more appropriate for a legislature than for a court. Thus, as the common law becomes more rationalizing, and as the source of its norms becomes less clear, it becomes less plausible to see courts as tracking the will of anyone. n57 And as this implausibility grows, the rhetorical cost of this practice grows as well. To the extent that it [*1795] became implausible to attribute the substance of federal general common law elsewhere, to the extent this law "finding" seemed more and more like law "making," the actions of the judges articulating this law increasingly appeared, in this sense, political.

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n55. I offer this explanation more as a hypothesis than as a claim, because I do not directly investigate the self-understanding of judges throughout the period. As a hypothesis, it helps explain the pattern I describe. But obviously its explanation of the pattern does not by itself validate the hypothesis.

n56. Elsewhere, I have called this view the "Frankfurter constraint," tying the idea to the attitude of Justice Frankfurter in a wide range of cases. Lawrence Lessig, Translating Federalism: United States v. Lopez, 1995 Sup. Ct. Rev. 125, 174 ("[A] rule is an inferior rule if, in its application, it appears to be political, in the sense of appearing to allow extra-legal factors to control its application.... To the extent that a rule appears political, we can observe that the Court will trade away from that rule.").

n57. James Whitman's statement about custom in the fifteenth and sixteenth centuries thus applies to the twentieth century as well: "The result was an evidentiary crisis of custom. As local gatherings gave way to governmental courts, larger and larger numbers of litigants found themselves in governmental courts in which their customary rights were safe in theory, but were in practice impossible to prove." James Q. Whitman, Why Did the Revolutionary Lawyers Confuse Custom and Reason?, 58 U. Chi. L. Rev. 1321, 1341 (1991).

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My argument is that this emerging impropriety created a pressure to restructure the practice of federal general common law. n58 Erie effected this restructuring. No longer would federal courts be free to ignore state courts on matters not federal; no longer would federal courts articulate a general common law. Common law lawmaking about nonfederal matters would be relegated to the states, to be allocated as the state chose either to state courts or to state legislatures.

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n58. Deborah Hellman has offered an extended and careful theoretical account of the relevance of appearance to the judicial role. See Deborah Hellman, The Importance of Appearing Principled, 37 Ariz. L. Rev. 1107, 1108 (1995) (examining the Court's growing concern with appearing principled and arguing that it should consider the appearance of principle in making decisions). Hellman's work would be central to an effort to justify a response such as the Erie-effect. I have not tried in this essay to offer a complete justification.

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It is from this story of change that I want to draw the model that I call the Erie-effect. The pattern has two steps: the first, the emergence of a kind of contestability about a practice within a legal institution (brought about by either a change in that practice, a change in the understandings about that practice, or a change in both); the second, a restructuring of that practice to avoid the rhetorical costs of that contestability. In Erie, the contestability was about the judicial role in the articulation of federal general common law. The response was to transfer the practice to another institution - the states. In other cases, the contestability will differ, and so will the response. But it is the conjunction of contestability and a response that I mean by the Erie-effect. My aim in the balance of this essay is to show its reach beyond this one case, and what it might mean for interpretive theory within law generally.

Much in this model will turn upon the meaning of contestability and the full range of accommodations that contestability might induce. I consider these questions below. But I first draw a parallel between the change that I have just described and the arguments of two Articles from this volume of the Review. My claim is that both are examples of the Erie-effect, and that seeing them in this way helps us to understand more fully their significance and reach.

II. Volume 110

The shift in Erie arose from two sorts of criticisms - one realist, the other positivist. Erie resolved the attack of each. Consider now a reflection of each criticism in two Articles from Volume 110, and an echo in each of a similar response. [*1796]

A. Bradley and Goldsmith on Customary International Law

Curtis Bradley and Jack Goldsmith tell a story that starts in the same place as Erie - with another part of the law of nations, customary international law (CIL). n59 Like the law merchant, CIL was a set of understandings among states that governed their relations. n60 And like the law merchant, it was a body of law that federal and state courts applied independently - the determinations of one were not binding on the other. n61

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n59. See Bradley & Goldsmith, supra note 1, at 816.

n60. See id. at 822.

n61. See id. at 823-24; Clark, supra note 15, at 1283-85; Fletcher, supra note 15, at 1517.

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For our purposes, however, the significance of this law is its customary nature, or more importantly, as I described Swift, its benignly customary nature. The customs behind CIL at the time of the founding were longstanding;

the raft of treaties and agreements constructed against their background made it plausible to say that they were, in a sense, incorporated into the positive international law of the time. This longstanding recognition and stable practice gave these customs legitimacy. n62 In large measure, they were defaults, like the law merchant. n63 And at least for domestic purposes, a sovereign always had the power to deviate from CIL, either through statute or through treaty.

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n62. See Bradley & Goldsmith, supra note 1, at 816-17.

n63. See Bridwell & Whitten, supra note 18, at 52. This view of CIL as based on custom does not mean that there were no consequences to a nation's choice to deviate from CIL, but only that those consequences, from a domestic point of view, were not legal consequences.

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Over time, but especially after World War II, customary international law changed. n64 In part, Nuremberg was the source, n65 but the sources of the shift were much broader than that. The new CIL declared that international law protected fundamental human rights, regardless of the consent of the sovereign. n66 Principles of human rights could pierce a sovereign's veil. n67 Citizens of a state could use international law to defend themselves from their state. n68 And although most nations recognized the content of these rights (and the justice in punishing the Germans for their nonrecognition), most also understood that these rights were only remotely the product of "consent" and "custom." Customary international law had become normative and rationalizing, in just the way that federal general common law had become normative and rationalizing. As with the change in the nature of federal general common law, this change in CIL would have significance.

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n64. See Bradley & Goldsmith, supra note 1, at 831, 838-42.

n65. See id.

n66. See id. at 840-41.

n67. See id.

n68. See Ruti Teitel, Transitional Jurisprudence: The Role of Law in Political Transformation, 106 Yale L.J. 2009, 2044-48 (1997).

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After Erie, Bradley and Goldsmith argue, courts and commentators spoke of CIL as federal law. Consequently, CIL was said to preempt inconsistent state law, and presumably bind the executive under Article II. n69 But on what basis, Bradley and Goldsmith ask? For as CIL has become normative and rationalizing - as its source is less the consent or practice of states, and more the articulation of academics about what fundamental human rights law requires - it has become more important to isolate, and justify, its source. As CIL becomes

normative and rationalizing, any implied delegation becomes less benign. The positivist's question thus becomes more salient: what is the source of these norms, and how can they apply as law within the United States?

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n69. See Bradley & Goldsmith, supra note 1, at 844-47.

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By pointing out this change in the understanding of what CIL was, I do not mean to criticize the substance of this new CIL. Indeed, in my view, the substance is among the most productive and compelling in modern jurisprudence. Rather, my aim is to recognize a question about source, given its substance. If CIL were simply the reflection of the actual practices and implied consent of nations, viewing it as a delegation would be relatively benign. But when CIL embraces the norms of human rights law, this source is much less benign. Judgments about it begin to seem less finding, and more making. They begin to seem "political." This "seeming political" is transitive: it passes from the source to its voice. Whatever the justice in its substance, it gives resonance to the question that Bradley and Goldsmith raise: who are judges to be making this law? n70

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n70. See id. at 837. This focus on the positivist's question is not to say that Bradley and Goldsmith do not also exhibit the realist half as well. They do, but I am ignoring it. The distinctive part of their argument is not its realism, but its positivism, or at least, a particularly narrow view of positivism. See generally Anthony J. Sebok, Misunderstanding Positivism, 93 Mich. L. Rev. 2054, 2059-72 (1995) (presenting a historical account of legal positivism in American jurisprudence).

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B. Kahan on Chevron and Criminal Law

Bradley and Goldsmith's argument thus parallels the first half of the criticism in Erie - the positivist half. The second half of Erie - the realist half - is mirrored in the story told by Kahan, although the realism here is of two very different kinds. The first is a realism about interpretation; the second, a realism about execution.

Kahan's story is this: the rhetoric of federal criminal law is that Congress makes the law, and courts and prosecutors find and apply it. n71 The reality is quite different. In ways that we simply cannot ignore - we, post-realists, cannot ignore - federal criminal law is made by people other than Congress. Courts purport to interpret the laws that Congress enacts, but this "interpretation" is always more [*1798] than mere "finding." Prosecutors purport simply to execute criminal law, but their choices are more than mere execution. n72 Both forms of execution (judicial and executive) n73 embody substantive judgments of policy - judgments that press the Erie-effect question: who are these courts, or these (effectively independent) prosecutors, to be making federal policy?

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n71. See Kahan, supra note 2, at 471-72.

n72. See id. at 479-81.

n73. This division comes from Montesquieu's views on the nature of the executive power. See Baron Charles de Secondat Montesquieu, The Spirit of the Laws 156-57 (Anne M. Cohler, Basia Carol Miller & Harold Samuel Stone trans., Cambridge Univ. Press ed. 1989) (1748).

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One might ask why we face this question now. The inappropriateness that Kahan identifies is nothing special to federal criminal law, nor is it special in the theory of interpretation of federal criminal law. Indeed, Kahan's observation follows quite directly from the shift that led the Supreme Court in 1984 to adopt the rule of Chevron n74 itself. In Chevron, the Court held that if a statute is ambiguous, the administrative agency charged with the statute's implementation gets deference in interpreting that statute. n75 It receives this deference because interpretive choices are policy choices, and policy choices should be made by agents with democratic accountability. n76

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n74. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

n75. See id. at 842-45.

n76. See id. at 865-66.

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Chevron marks a shift in the view of what interpretation is. It is realism applied to reading. n77 Interpretation in the sense in which we use the term today has a constructive aspect to it. Seeing this aspect raises a question about the legitimacy of the reader. If interpretation is, as the Court called it in Martin v. Occupational Safety and Health Review Commission, n78 "interpretive lawmaking," n79 the legitimacy of the lawmaker becomes especially important. In Chevron, the Court decided that as between the unelected judiciary and the presidentially appointed executive branch official, the democratic pedigree of the latter trumped the interpretive authority of the former. Courts were to defer to the agency because the agency was democratically more responsible. n80

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n77. As I have argued elsewhere, interpretation is also an example of the Erie-effect. See Lessig, supra note 3, at 426-38.

n78. 499 U.S. 144 (1991).

n79. Id. at 151 (internal quotation marks omitted).

n80. See Chevron, 467 U.S. at 842-45.

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Kahan applies this idea to the practice of federal criminal law. If interpretation is constructive, it is constructive with criminal statutes as well as with others. Judges interpreting criminal law are no more likely to be "finding" law than judges interpreting environmental statutes. When there is interpretation of ambiguous statutes, there is interpretive [*1799] lawmaking. It is this lawmaking that Kahan urges us to consider.

Kahan presses a second, more timely, realism as well, by focusing on the politics of prosecution. As Justice Scalia tried to teach almost a decade ago in a case considering the constitutionality of the special prosecutor statute, n81 prosecution is a political act. The decision whether to pursue a prosecution entails a judgment of policy. If this political act is to be allowed within our constitutional structure, to whom should this political actor be responsible? The best of Justice Scalia's argument in Morrison was exactly this: because individual liberty is at stake, and because the temptation to use prosecution for political ends is so great, a prosecutor must be accountable to an actor who is himself democratically responsible. n82

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n81. See Morrison v. Olson, 487 U.S. 654, 722-32 (1988) (Scalia, J., dissenting).

n82. See id. at 727-32.

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In the years since Morrison, people have begun to get the point. In my view, however, its truth is not eternal, but a story about our legal culture now. The truth is about the constraints, or lack of constraints, on a prosecutor now, and about the significance of that lack of constraints for democratic responsibility. As applied to federal criminal law "in the sense in which we think of such law today," n83 this realism pushes in just the way that the realism pushed Justice Scalia in Morrison - to locate prosecutorial power in a body that is more directly responsible to a democratic official.

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n83. Tompkins v. Erie R.R. Co., 304 U.S. 64, 79 (1938) (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)) (internal quotation marks omitted).

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Both realisms push Kahan as parallel realisms pushed the realists in Erie - to shift criminal policy judgments away from independent actors to a body more plainly responsible to the President, such as the Justice Department. The Justice Department, Kahan argues, should be given Chevron power, and more importantly, Chevron responsibility. n84

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n84. See Kahan, supra note 2, at 520-21. Chevron power in this sense is the power of the Justice Department to give a reasonable interpretation of an ambiguous federal criminal statute. Chevron responsibility is the responsibility of the Justice Department to read ambiguous statutes narrowly and to be accountable for those readings. An example of how this doctrine might have been applied is the recent controversy over the Communications Decency Act of 1996. See Telecommunications Act of 1996, Pub. L. No. 104-104, 502, 110 Stat. 56, 133-36 (to be codified at 47 U.S.C. 223 (a)-(h)). Lower federal courts rejected the Justice Department's efforts to define the scope of "indecency" under the statute. See, e.g., ACLU v. Reno, 929 F. Supp. 824, 850, 883 (E.D. Pa. 1996) (holding that provisions of the Act restricting certain communication over the Internet violate the First Amendment). Following Kahan, however, this decision may have been a mistake.

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C. Erie Reflections

Both Articles from Volume 110 parallel the change in Erie, each from a different side. One tracks the skepticism of the positivist; the other the skepticism of the realist. Both identify a practice that each works to render contestable. Each argues for restructuring that practice to eliminate this contestability. The questions are parallel; so too are the answers. Together, they constitute what I have called the Erie-effect. n85

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n85. We could summarize the cases with the following table:

[SEE TABLE IN ORIGINAL]

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My aim is not to endorse the substance of these two Articles. Nor is it to evaluate their weight. My aim instead is to use them to mark a pattern that is common in much of modern constitutional and statutory law. n86 This is the Erie-effect. Whether it describes the most important [*1801] interpretive changes of this century, or just most of the interpretive changes of this century, the Erie-effect suggests something significant about our practice of interpretation, and something significant for which a theory of interpretation should account.

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n86. I have described some of these examples elsewhere and the others I have space only to mention briefly. See Lessig, supra note 3, at 426-38. Other Erie-effect examples include Justice Scalia's arguments for presidential control over independent agencies, see id. at 435 (discussing contestability about an independent agency's law-following ability and recommending a reallocation of interpretive authority to the president); Judge Bork's arguments for a changed

understanding of antitrust law, see Robert H. Bork, The Antitrust Paradox 23-24, 26-27, 37, 42, 79-83, 87 (1978) (discussing contestability of judicial decisions about allocation in antitrust and recommending a change in antitrust doctrine to eliminate judgments about allocation and burdens of administrability); Justice Frankfurter's arguments for the change in the Court's Commerce Clause jurisprudence, see Felix Frankfurter, The Commerce Clause Under Marshall, Taney and Waite 54-58 (1937) (discussing contestability about standards to apply to the Commerce Clause and recommending judicial retreat); the retreat of the old Court in the face of the New Deal, see Lessig, supra note 3, at 461-72 (discussing contestability about whether the Court was acting politically in its retreat from continued restraint on the New Deal); the retreat of the Court in ratemaking cases, see Lawrence Lessig, Fidelity and Constraint, 65 Fordham L. Rev. 1365, 1388-93 (1997) [hereinafter Lessig, Fidelity and Constraint] (discussing contestability about judgments of value that led to a reduced role for the Court in reviewing ratemaking judgments by the legislature); the retreat of the Court from the federalism of National League of Cities v. Usery, see Lawrence Lessig, Fidelity in Translation, 71 Tex. L. Rev. 1165, 1225-26 (1993) (discussing contestability about judgments on "traditional state functions" that forced a retreat from the activism of the National League rule).

The pattern of these cases might suggest that the Erie-effect always yields less judicial activism. That conclusion does not follow. As I have argued elsewhere, sometimes contestability increases judicial activism. The key is to be precise about what has been made contestable. If contestability relates to the grounds for judicial action, then we have deference, as the examples in this essay suggest. But if contestability goes to the ground for resisting a right, the contestability may reinforce the right, and thereby increase activism. For example, if the Equal Protection Clause permitted discrimination against gays and lesbians because of a relatively uncontested view about homosexuality, then contestability about that view weakens the justification for discrimination, and thereby increases equal protection arguments for invalidating such discrimination. See Lessig, Fidelity and Constraint, supra, at 1427-29.

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What it suggests is the place of context in interpretive theory, and more importantly, the place of contestability in understanding the role of context in interpretive theory. I consider both in the section that follows. I then return in the final sections to the application of contestability to these cases, and to interpretive theory more generally.

III. Context and Contestability

The image is familiar even if we can't quite place it: an old man has a way about him. He learned how to behave long ago. He learned to hold doors, or smile vaguely, to compliment a dress, or to speak differently when speaking with (he would say "to") a woman. At the time he learned this, these were the actions of a decent man. But the world around him changed. As it changed, these acts took on a different meaning. Their meaning became sexist or insensitive. They no longer marked him well.

This image is not about pc-ism. It is about the vulnerability of meaning. It is about meaning's vulnerability to changes in context. Words and acts and

practices have a certain meaning in one place; when that place changes, the same words and acts and practices take on a different meaning. Meaning is vulnerable to these changes. It changes as the context changes. And sometimes it can change to render problematic something that before was completely benign. [*1802]

The Erie-effect rests on just such vulnerability. In the range of cases that it describes, an action or practice relatively unproblematic in one context is rendered problematic in another. The change in the common law, for example, was much bigger than the disputes about federal general common law; it was a change in the nature of law itself - both in its ideal and in its practice. As it changed, it rendered the practice of federal general common law problematic, increasing the rhetorical costs to those engaging in the practice, and creating a pressure on the federal courts that had not been there before.

And so the practice changed. For the law (unlike the old man) does not sit by passively as its actions are rendered problematic. The law's response is quite direct. It responds with institutional reallocation. A practice is reallocated from one institutional actor to another, from an actor vulnerable to the pressures or rhetorical costs of the practice at issue, to one less vulnerable to those costs. In response to contestability, the court picks a path that renders the contest less problematic.

At the core of this account is an idea of contestability. It is time to say a bit more about what this notion is. In the sense that I offer it here, contestability is a social predicate. It describes a social understanding, a type of sociology of knowledge. n87 Two conditions mark its presence. An issue is contestable when there is actual and substantial disagreement about it (that is, when it is actually contested), and when that disagreement is in the foreground of social life (that is, when it is seen and understood as generally contested). Both conditions are necessary, and both have an empirical and an interpretive component. The first requires that there be actual disagreement among a substantial proportion of the relevant public (a predominantly empirical question); the second that there be an awareness of and salience to that disagreement (a predominantly interpretive question). n88 Both conditions are independent of the truth of what is disputed: to say that something is contestable is simply to report a social understanding that there is disagreement about it, and that such disagreement is, for that issue, appropriate. It is not to say that there is no truth about the matter, or that there are no right answers. n89

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n87. Cf. Karl Mannheim, Ideology and Utopia 2-5 (Louis Wirth & Edward Shils trans., Harcourt, Brace & Co. 1952) (discussing the comparable sociology of knowledge).

n88. Thus, in the way in which I am using the term, "contested" refers to a social fact - that there is disagreement. "Contestable" refers to it being seen as appropriate that there is a contest about a certain issue. As I describe more fully below, an issue can be contested in the sense I mean without it being contestable, although it cannot be contestable without also being contested. Likewise, an issue can be uncontested without being uncontestable, but not uncontestable without being uncontested. An issue is uncontested when there is not a substantial disagreement about it; but it is uncontestable when it is understood to be inappropriate or odd to contest it.

n89. Obviously, contestability is relative. No discourse is completely contested, or absolutely uncontested. There is no truth for which disagreement cannot be generated, and neither is there a disagreement that is complete or radical. Nor will it be easy to draw lines between the contestable and the uncontestable. All that is necessary to make the claim understandable is the belief that on this continuum black does turn to white. My claim is simply that we gain something by considering the difference between black and white, or at least the difference among shades of gray.

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[*1803]

Some examples may help. Abortion, for us, is the clearest case of a contestable discourse. There is actual disagreement about the morality of abortion, and there is awareness that this disagreement exists and is important. Disagreement about abortion is in this sense normal or appropriate. There is space for differing views - a social space, constituted by an understanding about what views are reasonable. n90

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n90. See Robert C. Post, Constitutional Domains: Democracy, Community, Management 73 (1995) (describing the social space defined by norms of privacy). Like Post, I am claiming that these social understandings define a space of constitutional appropriateness, though here the social space is the appropriateness of judicial action, rather than privacy.

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Infanticide is just the opposite - not infanticide of extremely dysfunctional babies, but infanticide for reasons as subjective or wide-ranging as the reasons that a woman may legitimately have for an abortion. There is not a contest over whether infanticide so understood is morally justified. It is not. Nor is there any sustained public attention directed to the matter. n91 The immorality of infanticide so understood is relatively uncontested and in the background of social life. It is a part of the moral universe that we simply take for granted. n92

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n91. There is, however, periodic questioning of the matter. See Jan Hoffman, Teen-Agers Indicted for Murder in Newborn's Death, N.Y. Times, Dec. 10, 1996, at B1 (discussing the indictment of a teenage couple accused of murdering their newborn son).

n92. To test this conclusion, imagine the response if one genuinely and persistently aimed to question the dominant view. If one in full seriousness insisted upon the morality of infanticide - if one made this questioning of the dominant view one's life's work - one would not just face people who disagreed. One would face people who thought such a choice odd or alien. People who dissent from views such as these are not just different; they are outsiders. They do not just hold views contrary to the dominant view; they hold views that make them strange or abnormal. Disagreeing with views like these places one outside the normal social space. Issues such as these are simply off the table of moral or political debate.

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These two cases mark out the extremes. But the extremes will not fully describe the dynamic that I want to track. Contestability moves through stages, and a matrix will better describe these stages and the paths through which it might move.

A. A Matrix of Contestability

I said that there are two conditions on contestability - an issue is either contested or uncontested, and it either lies in the foreground or background of public attention. These two conditions map four possibilities: [*1804]

[SEE TABLE IN ORIGINAL]

The extremes are box [1] and box [3]. Box [1] is the category of the contestable (both contested and foregrounded); again abortion is the paradigm case. Infanticide is its opposite, in box [3]: the uncontestable (neither contested nor foregrounded). These two boxes represent the boundaries on a continuum, with the two other cases lying in between.

These middle cases are the more interesting - interesting because they show us something about how contestability changes. Start with box [2]: these are discourses within which there is no longer a substantial dispute, but that continue to occupy public attention. Quid-pro-quo sexual harassment is an obvious example: views about the impropriety of sexual harassment are no longer contested. They once were, but that contest has quickly, and dramatically, died. Yet the topic still occupies public attention - an attention that is directed with an important vigor at rooting out continuing instances of this harassment.

This is the character of box [2] discourses. They have the flavor of a campaign. They are issues that we feel committed to reforming in the direction that the contest has resolved itself. Yet there is a sense that public attention is still required to effect this reform. There is, in other words, a consciousness and intensity to them; a commitment to eliminate the contrary view; a certain patriotism, or virtue, or sometimes self-righteousness, in speaking out against the contrary view; a certainty that the contest has, in principle, resolved itself; and an ideal about pressing that resolution to completion.

Box [2] discourses contrast with cases in box [4]. Box [4] represents cases where there is actual dissent, or a contest, yet the contest, for some reason, remains in the background of social life. An example is the issue of sex equality just after the ratification of the Fourteenth Amendment: certainly there was substantial disagreement about whether equality norms should be extended to women as they had been extended to black men. n93 If people had been asked, they would have taken very different positions on the matter. Yet for reasons unexplained, this dispute stayed quite firmly in the background of social and political life. One might say that the issue was suppressed, though not because some conspiracy succeeded in keeping people quiet about it. Rather, the dispute was not perceived to have social salience at the time. It took time and political action to force the issue into the public eye.

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n93. This disagreement was pressed in the Supreme Court in the case of Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872). Bradwell challenged Illinois's exclusion of women from the practice of law; the Supreme Court rejected the claim. See id. at 139.

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[*1805]

Box [4] disputes are a resource for entrepreneurs of social change. These are the disputes that fuel social change. Change entrepreneurs draw upon these disputes, and if successful, force them into box [1]. Catharine MacKinnon's work on the law of sexual harassment is the clearest example of this process. MacKinnon took the issue of sexual harassment from box [4], and through both her writings about sexual harassment and the litigation that she and others waged, succeeded in pressing the issue into box [1]. n94 After a relatively short time, the contest in box [1] was importantly resolved - sexual harassment was determined to be sex discrimination. n95 This determination moved the dispute into box [2], in which it currently remains, eventually (we might expect) to fall into box [3].

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n94. See Catharine A. MacKinnon, Sexual Harassment of Working Women passim (1979); Susan Estrich, Sex at Work, 43 Stan. L. Rev. 813, 816-26 (1991). I claim that MacKinnon moved the debate from box [4], rather than box [3], because feminists, without law, had done much to make the issue ripe within the law before MacKinnon took hold of the argument.

n95. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986).

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As I have described it, this matrix may apply to any domain of social discourse. It could describe political discourse, legal discourse, discourse within some field of fashion, or even discourse in physics. n96 The matrix is simply a mapping of the modalities of dialogic appropriateness, tracking the propriety of disputes within a particular discourse, and tracing how that propriety might change. The matrix does not attempt to explain why these modalities change; it simply offers a way to speak about the differences that such modalities might present.

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n96. There is a huge body of literature related to this question, much of it tied to Thomas Kuhn's work. Kuhn scholars will argue that Kuhn has little relevance outside of the history of science, see Gary Gutting, Introduction to Paradigms and Revolutions: Applications and Appraisals of Thomas Kuhn's Philosophy of Science 1, 12-15 (Gary Gutting ed. 1980), though it is plain that many have seen parallels to Kuhn's argument outside of science, see, e.g., Stephen A. Siegel, Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation, 70 Va. L. Rev. 187, 261 & n.315 (1984). Although my account might resonate with much in this latter tradition,

I do not believe it would be helpful to engage that debate here. The point should stand on its own, whatever its echo with debates outside of law.

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My claim within law, however, is that these differences matter to how a court will treat a question within a particular discourse. When the legitimacy or appropriateness of a given practice is itself drawn into doubt - when it becomes, in the sense that I've described, contestable or within box [1] - the court will find a way to restructure this practice so as to avoid the cost of this perceived inappropriateness. This, again, is the Erie-effect. Alternatively, though beyond the scope of this essay, when the legitimacy of a court engaging a given practice is not in doubt - when it is, in the sense I have described, uncontestable or within box [3] - the court will engage in that practice quite actively, relying upon its truths, regardless whether they were the truths that the discourse originally admitted. Both extremes are constraints on interpretive judgment: contestability, by forcing a [*1806] kind of judicial neutrality; uncontestability, by forcing a conformity to the then uncontestable truths.

Again, the matrix does not explain why a discourse moves from one box to another, n97 and I do not believe that any general account is possible. Rather, it draws out features of these discourses, and suggests ways to account for differences in how discourses are treated. It is a topology of the differences that contestability might make, and although my focus has been quite narrow, it may explain differences beyond those I have sketched. It might, for example, suggest a way to think about the appropriateness of governmental involvement in the construction of a certain view within a particular discourse. I take it, for example, that there is a difference between the government taking sides in a dispute about abortion and the government taking sides in a dispute about sexual harassment or smoking. First Amendment demands of neutrality seem appropriate in the first case, but oddly not in the second two. n98 But this difference may align with different locations in the matrix. Sexual harassment and smoking are box [2] disputes: they are areas in which we believe social meanings need to be remade, and where as a consequence we give the government greater leeway in aiding social changes. n99 But with box [1] disputes such as abortion, contestability remains; here it is more appropriate for government to remain neutral. It is box [1] discourses that seem most [*1807] susceptible to First Amendment arguments for neutrality; and box [2] disputes where they are often ignored. n100

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n97. This change in contestability can be seen by comparing the discourse over due process and the discourse over separation of powers. In the late 1970s, due process was less contested than separation of powers, in the sense that a claim of unconstitutionality grounded on the former would have been far more likely to succeed than one based on the latter. In the 1990s, the position is reversed; a claim based on separation of powers now has a far more automatic, or natural, sound to it than a claim based on due process. Plaut v. Spendthrift Farm, 115 S. Ct. 1447 (1995), is a perfect example of this difference. In Plaut, the Court had the option of deciding the case on either separation of powers or due process grounds and chose the former. See id. at 1450, 1452; id. at 1467 n.2 (Stevens, J., dissenting). Quite likely it would have followed the latter thirty years before.

n98. Compare the fervor of the battle over the First Amendment issue in Rust v. Sullivan, 500 U.S. 173, 192-200, 204-15 (1991), with the court's timidity in dealing with the question presented in Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1534-37 (M.D. Fla. 1991).

n99. I try to advance an argument like this in Lawrence Lessig, The Regulation of Social Meaning, 62 U. Chi. L. Rev. 943 (1995), though there, like here, it is underdeveloped. My suggestion, however, is that this way of dividing up discourses might have relevance to a theory identifying those cases in which it makes sense to allow more government intervention in the construction of social meaning, as opposed to those cases in which it makes sense to allow less. Government intervention in box [1] cases would be the least permissible (because plainly contested). Box [3] cases may be what the morality exception (through obscenity law) in First Amendment law is about. Box [4] cases are the most predictable, and perhaps most troubling, because the state can use its power to suppress a contest. Box [2] may represent the least troubling and most appropriate area for government intervention. Cf. Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 479-82 (1996) (explaining differential treatment in terms of government motive).

n100. This suggests a way to understand MacKinnon's success, and failure, in her efforts to regulate pornography. Her success was in getting the political in porn made public - in getting others to see that it is an expression of a particular view of women. But this success rendered discourse about the message of porn political. Because political, regulation of such views was more easily seen as viewpoint based, because it is regulation that advances one (contestable) view over another. See American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 329 (7th Cir. 1985); Lessig, supra note 99, at 947.

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B. Applying the Matrix to Erie and Volume 110

However broadly the matrix might reach, we can tie it back to the Erie-effect in a fairly direct way. The discourse at issue in Erie moved through all four boxes. n101 The practice of federal general common law as announced in Swift - given its narrow scope and the early salience to the law of nations - was relatively uncontested and backgrounded. n102 It was a discourse that started in box [3].

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n101. See Freyer, supra note 16, at xiv-xv (tracing the development of and opposition to the Swift doctrine).

n102. See, e.g., Fletcher, supra note 15, at 1517 ("Applicability [of federal general common law] was so obvious as to go without saying.").

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As the nature of that practice changed, and as ideas about positivism and realism matured, questions about the practice were thrown into relief. For a while, these questions did not register. They were then within box [4]. Justice Field, and later Justice Holmes, in lonely yet passionate dissents, continued

to push the questions forward. Eventually, Justice Holmes succeeded. Here Holmes is MacKinnon, though for a far less significant issue, and over a much greater period of time. His work succeeded in making the appropriateness of federal general common law contestable. Erie in turn mooted the contest, by relocating the practice so as to avoid the perception of inappropriateness. It thus moved the dispute from box [1] to box [2]. Finally, time and practice allowed the issue to fall again into box [3], so completely that most of us cannot even recognize what Swift was about. We have forgotten the struggle and its meaning; we are left baffled by the language of Swift and its progeny.

The matrix teaches something about the two Articles that are the focus of this essay as well. Neither Article describes a discourse that has moved through all four boxes. At best, the discourses of each Article began in box [3] with a practice that, in its original context, was relatively uncontested and backgrounded. Over time, this uncontestedness changed, moving the discourses into box [4].

It is here that the Articles from Volume 110 enter. Both make a bid at focusing our attention on its particular contest; both aim to force its contest into the foreground. Both attempt to make contestable [*1808] the Court's role in each of these different domains, by showing something about how we now should view each discourse.

The contest that Bradley and Goldsmith identify is the contest over the status of customary international law. Within the culture of international lawyers, CIL has an evolving, naturalistic quality. It is a practice that continues the rhetoric of Swift; it is openly truth and justice seeking, less and less constrained by the actions of sovereigns. But within the culture of domestic lawyers, such rhetoric - such non-positivistic law - seems not law at all. Rhetoric such as this died in U.S. domestic law with Erie. Thus a conflict exists between rhetorics, which Bradley and Goldsmith use to push this discourse from the background into the foreground. Their aim is to move the discourse from box [4] to box [1] - thereby making the practice contestable - by making plain the domestic law implications of the international lawyers' view. n103 Two legal cultures clash, and Bradley and Goldsmith use this clash to make the practice of CIL contestable.

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n103. For example, see Bradley & Goldsmith, cited above in note 1, at 838-46.

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This contest has been brought about both by a change in the practice of CIL and by a change in ideas about the nature of CIL. The practice of CIL is more extensive, and more normative; its conception is more naturalist. These changes combine to create a tension when this modern international law is brought home. From the perspective of a tradition that is more positivist and realist, this naturalism seems out of place; and its implications, Bradley and Goldsmith argue, unconstitutional.

The contest that Kahan points to is similarly the product of a change in both practice and ideas. Here, the changed practice is the extraordinary growth of federal criminal law, fueled by very general criminal prohibitions. n104 As the courts have processed this increase, the practice of federal criminal

common law lawmaking has become more extensive. As the gaps to be filled have widened, this practice of gap filling has become less benign. At the same time, ideas about interpretation have also changed. As I described above, realism has invaded thought about reading. The constructive inherent in reading is more plainly at the fore.

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n104. On the growth of federal criminal law, see, for example, Sara Sun Beale, Federalizing Crime: Assessing the Impact of the Federal Court, 543 Annals Am. Acad. Pol. & Soc. Sci. 39, 42-44 (1996); Sara Sun Beale, Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction, 46 Hastings L.J. 979, 980-81 (1995); and Deborah Jones Merritt, Commerce!, 94 Mich. L. Rev. 674, 707-09 (1995).

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Both changes combine to produce the contest that Kahan identifies. He, like Bradley and Goldsmith, is a contest entrepreneur; his aim, like theirs, is to escalate that contest into box [1].

Both Articles thus push the first step of an Erie-effect - both push to inflame. But both also have an answer to the contest that [*1809] they attempt to create. Bradley and Goldsmith's answer is that CIL not be considered federal common law; Kahan's answer is that Chevron deference be accorded to the Justice Department. Both answers are, like Erie, recommendations about how to restructure an existing judicial practice; both suggestions would, through this restructuring, reduce the rhetorical cost of continuing the practice.

This common feature of these two Articles helps reveal an aspect of the Erie-effect that my discussion of Erie might have hidden. This is the choice that contestability yields. The discussion of Erie emphasized the constraints of the interpretive context that, in 1938, forced the Court to remake federal general common law. The picture is of a court that cannot help but do something; of the old man who has found his actions have different meanings, and who has little control over the meanings they now have. The image is passive - discourses are rendered contestable, while the old man simply sits by.

But this passivity is overstated, and these two Articles suggest why. Bradley and Goldsmith and Kahan identify a contest; they aim to force it into the foreground; and then they argue for a change to relieve the contestability that they have alleged. These are actions taken by individuals, and eventually (if they are successful) by a court. The creation of contestability is the product of action, whether by judges (such as Justices Holmes and Field with respect to Erie, or Justice Scalia with respect to prosecution) or academics (such as MacKinnon with respect to sexual harassment). In each case, it succeeds in part because of this action, and in part because of the state of the interpretive context within which it gets played. Not every backgrounded but contested box [4] discourse can be rendered contestable; and not everyone can render contestable those that can. The contest entrepreneur is no doubt constrained, but he or she acts against those constraints. It is these actions that produce an Erie-effect.

The response to contestability is also active. The Court changes something n105 to relieve the perceived pressure of the contestability then felt. In

changing something, the Court has a choice about what will be changed - again, not a choice unconstrained by the interpretive context, but also not a choice completely determined by the interpretive context. Instead, the choice reflects the strength of the various values at stake. The choice says something, and what it says may itself create a kind of contestability.

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n105. In the full range of examples, what changes differs. In some cases, the Court shifts the practice to the institution with the greatest legitimacy given the contemporary ideological context (Chevron, Erie); in other cases, it simply adopts a rule that reduces political pressure.

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We can see this dynamic by comparing the choices implicit in the arguments of Bradley and Goldsmith and Kahan. Here is a prediction: the reallocation pressed by Kahan will be an easier change to effect than the reallocation pressed by Bradley and Goldsmith. I am [*1810] not recommending it, and I do not even know whether it is feasible. But if it were, my sense is that its costs are less significant than those of Bradley and Goldsmith's proposal. The reallocation that Kahan recommends does contradict values in our legal tradition, but the salience and importance of that contradiction, I suggest, will not be noticed. Kahan effectively argues that these values would be better advanced if the allocation that he presses for were adopted. n106 But never mind - even if they were not, they are not as significant as they may once have been. Giving Chevron deference to the Justice Department for ambiguous criminal statutes (and granting lenity when the Department fails to execute properly that deference) will not be such a terrible price to pay if the Article, along with similar articles, succeeds in making the issue contestable, and if the contestability is resolved in this way.

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n106. See Kahan, supra note 2, at 493-506.

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The same cannot be said about Bradley and Goldsmith, and here we must be more precise about describing their point. One aspect of their argument is quite formal and absolute: express authorization of CIL is required before CIL can become federal law. n107 At times they back away from this certainty, n108 but it is not clear, on their own terms, just how. In their strictly positivistic view, the only law is domestic law, and the only domestic law is statute or constitution based; so before international law gets incorporated into a domestic regime, a statute must ratify it. n109

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n107. See Bradley & Goldsmith, supra note 1, at 840-42.

n108. See id. at 852.

n109. This idea of a written text being at the base of all law is not the essence of positivism. Whether written or not, all that most forms of

positivism require is a rule recognizing some founding authority. See Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 881, 887 (1986); Sebok, supra note 70, at 2062-65. A narrow reading of Bradley and Goldsmith's claim is that it reaches only the new CIL, not CIL in general. But this simply focuses on the part of CIL that has changed.

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One might resist this formalism, however, and reach a somewhat different result. No doubt all law is domestic in the sense that it must be adopted by some domestic authority. n110 But one might imagine a regime that did not as strictly insist upon express authorization, at least within certain domains. In particular, in box [2] or [3] discourses, one might well imagine that rather than insisting on a clear statement rule of recognition, and thereby sacrificing a tradition of honor in international law, n111 the Court could instead recognize a tradition as longstanding or uncontested enough to be treated as adopted, the absence of a statute notwithstanding. Or more directly, in this conflict between a particular philosophy of law and a value of justice, the [*1811] choice of the philosophy at the expense of justice may itself be too high a rhetorical cost.

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n110. See The Western Maid, 257 U.S. 419, 432 (1922).

n111. See Anne-Marie Burley, The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor, 83 Am. J. Int'l L. 461, 488-93 (1989).

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I may well be wrong in this prediction. The most recent work of the Supreme Court suggests that I am. n112 But whether wrong or not, my point is only to emphasize the choice involved. If the contest that Bradley and Goldsmith champion is eventually recognized as contestable, then how the Court moves the discourse from box [1] to box [2] will say something about the legal values that the Court recognizes - about the value, we might say, of legal philosophy versus justice.

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n112. See United States v. Alvarez-Machain, 504 U.S. 655, 666-68 & nn.14-15 (1992) (holding that, contrary to international law, kidnapping does not invalidate prosecution); Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989) (refusing to consider international standards and practice in construing the Eighth Amendment); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 441-43 (1989) (refusing to allow CIL exemption to Foreign Sovereign Immunities Act).

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IV. Conclusion

I have drawn from Volume 110 two examples of a more general pattern. My aim is the pattern, not the particular examples. I have argued that the Erie-effect describes a class of legal change, brought about by changes in an interpretive

context - by a contestability about practices within that interpretive context. It is a piece of a more general account of how context matters in interpretive theory. It is a promise that we might say something theoretical about how context matters - not because the theory is driving the examples, but because the examples and the theory might help us understand a certain class of interpretive change. More directly, they help us understand how changes in context can yield changed readings, and how these changes may be changes of fidelity. n113

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n113. I discuss this idea of fidelity in Lessig, cited above in note 3, at 401-03.

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Most constitutional theory, I would argue, underplays the role of context. Most focuses on what we might call first-order objects of interpretive analysis - text, structure, historical understandings, and moral principles - objects that have their effect because of the substance of what they say. The question from this perspective is whether X with meaning Y has properly been added to the interpretive equation; disputes are over the range of permissible X's and the various Y's that the X's may yield.

The Erie-effect looks to second-order phenomena - not to the substance of the object at issue, but to its social understanding or social meaning within its adjudicated context. n114 It tracks shifts in the appropriateness of using that object, or class of objects, within some domain of interpretive dispute, and it predicts something of the effect that such shifts might yield. In this, the Erie-effect functions much like a motion for summary judgment: it resolves a question of interpretation [*1812] by tracking not truth, but contestability; it expresses the constraints of judgment based not on truth, but on contestability.

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n114. See the discussion in Lessig, cited above in note 99.

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By responding to contestability, the changes yielded by the Erie-effect might be said to demonstrate a certain respect for democratic authority. For by responding to contestability, courts are deferring where their claim to judicial authority appears most problematic. This is a practice of appearance, n115 but it may say something about what courts believe their proper role to be. It thereby links the arguments of these two Articles, as well as the other examples of the Erie-effect, to something more fundamental in our judicial tradition - to the view that judges should not speak about matters that are viewed as contested, and hence political.

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n115. See Hellman, supra note 58, at 1108-09.

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Left open, of course, are many questions - ranging from questions about the justifiability of such change, to questions about how such change is identified, to methodological questions about when a discourse is contested, or contestable, and about what keeps a contest in the background. This is the work that context theory needs to complete. This essay has not done that work. Its aim is simply to suggest the place and possibilities that such an account might provide.